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NO. 99-1952

Supreme Court, U.S.
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In the Supreme Court of the United States

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, AND WYOMING,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY AND CHEVRON U.S.A. INC.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

The States of Alabama, et al., ("States") respectfully submit that the briefs in opposition of the Department of Energy ("DOE Opp.") and Chevron U.S.A. Inc. ("Chev. Opp.") provide no serious rebuttal to Petitioners' showing that this Court should exercise its supervisory power to prevent termination of this important public interest case without any appellate review.

I. Respondents' Arguments Fail to Rebut the Petition's Showings That the Issue Appealed Is Separable and Within Tenth Circuit Jurisdiction, There Is No Bar to Exercise of That Jurisdiction, and There Is No Basis for Abstention.

A. This Case Is Not "Factbound" or Unimportant to Other Litigants as Respondents Suggest: the Court Should Make Clear That Those Seeking Justice in the Federal Courts Must Be Heard in Courts of General Jurisdiction Unless Barred by Congress or this Court. Here no statute, no precedent and no compelling reason prevents the Tenth Circuit, especially after accepting the States' Steel[1] argument, from simply deciding the issue brought to it: should the DOE (and Chevron) be able to evade review of an asserted breach of a solemn court-approved contract with all 50 states by hiding behind an erroneous district court reading of a statute within the regional circuit's purview? The Tenth Circuit should have answered that question, especially since DOE's view of the statute has always been opposite to that of the district court.

B. The Suggestion That Steel Does Not Apply to a Dismissal for Unreviewability Is Not Supported by Any Authority, and Steel Leaves the "Prosecutorial Discretion" Issue as the Only Issue Required to Be Decided. The States' appeal made two pivotal contentions: (1) that this Court's Steel ruling precluded the district court from going further once it determined, under the DOE Act, that the contested Office of Hearings and Appeals ("OHA") decision was unreviewable as prosecutorial discretion; and (2) that the only basis for that determination was an erroneous reading of

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[1] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

the DOE Act contradicted by the text and legislative history of the DOE Act, by 20 years of agency interpretation, and by ARCO.[2]

Respondents provided adjectives ("contrived," "meritless"), but no authority in attacking the Steel point below. Ultimately, the Tenth Circuit agreed with the States on Steel, ruling that the district court should have stopped once it decided that it lacked jurisdiction over the case. Because "Steel rejected the use of so-called 'hypothetical jurisdiction' to reach the merits of a case, and a jurisdictional dismissal is all that is necessary to the holding," the rest of the district court's decision was dicta. Pet. App. A-12. Now, without mentioning or analyzing Steel, or citing any case, Chevron implies (Chev. Opp. at 16) that the Tenth Circuit erred in applying Steel, because the district court dismissed for "unreviewability," not lack of jurisdiction. But, as the States' brief below (99-3065 at p.34 & n. 33) explained (with citations), for Steel purposes at least, unreviewability is jurisdictional. Thus the Tenth Circuit was correct in vitiating the rest of the district court's opinion, leaving only its unreviewability ruling based on the DOE Act, a law not assigned to the Federal Circuit, for the appeal.

The application of Steel thus negates Respondents' central contention, that the Tenth Circuit lacks jurisdiction here because of potential Federal Circuit issues in the appeal. For the Federal Circuit and TECA decisions make clear that the specialized court's exclusive jurisdiction does not attach unless resolution of the case required application of a statute assigned to the specialized court *and* "'the ...[specialized court] issue must have been adjudicated in the district court.'" Phoenix Petroleum Co. v. FERC, 95 F.3d 1555, 1563 (Fed. Cir. 1996); quoting Texas American Oil Corp. v. DOE, 44 F.3d 1557, 1563 (Fed. Cir. 1995); *see also* ARCO, 769 F. 2d at 779 ("... decided by the district court on that basis"). The Tenth Circuit's fear of lurking Federal Circuit issues in the appeal (for which, as shown below, Respondents provide no support) does not create Federal Circuit jurisdiction, since these issues were simply

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[2] Atlantic Richfield Co. v. DOE, 769 F.2d 771(D.C. Cir.1984).

not "adjudicated in the District Court" once Steel was applied.

C. The Argument That the Tenth Circuit's Decision Does Not Conflict with the D.C. Circuit's ARCO Decision Is Plainly Wrong. From 1984 to 1999 no one questioned the ARCO ruling that the nature of OHA's function under the DOE Act in Remedial Order cases is a discrete, separable issue within regional circuit jurisdiction, even though the substance of Remedial Orders is governed by statutes under the specialized jurisdiction.[3] The Tenth Circuit's decision that it cannot decide precisely the same issue is thus in direct conflict with ARCO. On the merits of the DOE Act issue, ARCO decided that the Act does not limit OHA to prosecutorial functions in Remedial Order cases, but permits it to have the adjudicatory function delegated to it and exercised both in that case and here. Thus, the district court's decision, that the DOE Act restricts OHA to prosecutorial functions, directly conflicts with ARCO, as does the Tenth Circuit's decision to let that holding stand. Chevron argues (Opp. 13-14; *see also* DOE Opp. at 10 n.5) that the limitation of OHA to prosecutorial functions was asserted in ARCO to nullify OHA's discovery powers, while it is asserted here to deny reviewability. That distinction does not alter the basic question or the jurisdiction to answer it. In both cases, the decision actually turned on whether OHA may act as an adjudicator or is limited to a prosecutorial role under the DOE Act.

D. Respondents' Argument That There Are Three Lurking Federal Circuit Issues Is Both Legally and Factually Deficient. Respondents lean heavily on the Tenth Circuit's assertion that in addition to the DOE Act issue, it would also have to decide three Federal Circuit issues. The Petition and discussion above show that this argument is legally deficient, first, because to the extent that these issues were addressed by the district court, they were eliminated by Steel, and Federal Circuit jurisdiction extends only

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[3] See 769 F.2d at 778-80. Respondents rely heavily on Consolidated Edison v. O'Leary, 131 F.3d 1475 (Fed. Cir. 1997)("Con Ed"), but that case, too, on the page cited by the district court (131 F. 3d at 1481), decided the DOE Act issue as a separate matter, without reference to the ESA/EPAA.

to issues "adjudicated in the district court," and second, because the DOE Act issue is, under ARCO, severable. The Petition (p.19 n.23) also showed specifically that the asserted Federal Circuit issues are not in fact present, because (1) the prosecutorial discretion holding of the district court relied only on the DOE Act analysis and no other holdings in Con Ed;[4] (2) on its face FSA §IV.A.2 merely preserves existing prosecutorial discretion, and, since it does not determine OHA's role, is irrelevant here; and (3) Chevron's supposed ESA defense is in fact a DOE Act defense. Respondents' Oppositions fail to rebut these specific showings.

E. The Argument That the Regional Circuits Are Precluded from Ever Considering Issues over Which the Specialized Court Might Assert Ancillary Jurisdiction Is Absurd. DOE claims that because the Federal Circuit decided the DOE Act issue in Con Ed, and (in an unpublished, non-citable order[5]) rejected a suggestion that it lacked jurisdiction to do so, "the Federal Circuit considered

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[4] The district court did not apply the standing discussions in Con Ed to dismiss the States' FSA claim, because the court apparently recognized that, unlike the Con Ed plaintiffs, the States, as parties to the FSA, had conceded standing to enforce it. *See* Chev. Opp. 5 (standing uncontested on FSA claim).

[5] While not wishing to complicate the decision on this Petition, the States feel compelled to request the Court to strike and/or ignore references in the Oppositions, DOE Opp. at 3-4 and 11-12, n.7; Chev. Opp. at 1, to the Federal Circuit's unpublished, uncitable order of March 25, 1998, and impose whatever other remedies it may deem appropriate to enforce Fed. Cir. Rule 47.6(b). That order bore the legend, "... this disposition is not citable as precedent," and that warning was reiterated in the very listing of orders in the West volume cited by Chevron. *See*, Decisions without Published Opinions, 152 F.3d 938 & 945 (Fed. Cir. 1998). More disturbing, neither respondent disclosed to this Court that on May 22, 1998, DOE had asked the Federal Circuit to change the unpublished, uncitable status of the order for the explicit purpose of using the order in the cases below here, that the States opposed that motion, and that the motion was denied by the Federal Circuit on June 3, 1998. (Copies provided to the Clerk.) To the States' knowledge, neither the Federal Circuit, nor (assuming it could) the Tenth Circuit, nor this Court has granted Respondents permission to cite or use the uncitable order. [If this material is struck, the text herein referring to it should also be struck].

petitioners' claims under the DOEOA to be within the Federal Circuit's exclusive jurisdiction." DOE Opp. at 11-12, n.7. That claim is belied by the order itself. The Federal Circuit merely stated that its assigned authority "permits us to construe other statutes when necessary to resolve the ESA/EPAA issue raised on appeal." *See* DOE Opp. at 4. It did not suggest that the regional circuits, which have primary jurisdiction over the DOE Act, are precluded from deciding DOE Act issues appealed to them.

Con Ed decided a DOE Act issue as an exercise of "ancillary" jurisdiction to decide non-assigned issues subsidiary to the primary specialized issue appealed. *See* Phoenix Petroleum, 95 F.3d at 1563 (TECA could "consider and apply laws in interaction with the EPAA/ESA *in the course of deciding the issue before the court*") (emphasis supplied). Where, as here, no primary ESA/EPAA issue is appealed to which the DOE Act issue could be ancillary, jurisdiction over the regional circuit issue remains in the regional circuits. The suggestion that a DOE Act issue must always be heard by the Federal Circuit, simply because it was addressed by that court in another case as ancillary to ESA issues raised in that appeal, is absurd. Such a rule would transfer large portions of federal authority from the general courts to the specialized courts without logical basis and without congressional authority, in violation of this Court's clear direction that only Congress can "invest ... or withhold" jurisdiction from federal courts. *See* Petition at 15.

Chevron's description of the Tenth Circuit opinion suggests that the court relied on the Federal Circuit's "ancillary" jurisdiction to disclaim jurisdiction over the entire appeals here, including the DOE Act issue. *See* Chev. Opp. at 9-10. In fact, rather than suggesting that the DOE Act issue was "'inextricably linked and subsidiary to the FSA issue,'" *id.*, the Tenth Circuit opinion could not be clearer that it relied on the Federal Circuit's "ancillary" jurisdiction only to reject jurisdiction over the other, non-DOE Act procedural challenges raised by the States. Pet. Appendix A-14. The court determined that the "subsidiary" issues, although not

themselves within the specialized jurisdiction, should be decided in the Federal Circuit along with the primary reviewability issue. *Id.*[6] This holding in no way suggests that the DOE Act issue somehow falls under the Federal Circuit's ancillary jurisdiction.

F. The Cases Cited by Chevron Do Not Raise Issues Required to Be Decided in this Appeal. The question raised in this appeal was whether the District Court erred in deciding that OHA exercises only prosecutorial discretion under the DOE Act. The cases cited by Chevron, relied upon in Con Ed in denying standing to non-signatories to the FSA, Chev. Opp. at 12 and nn. 16 &17, were not, as discussed above, related to Con Ed's DOE Act holding, or to the issues here. Their facts are wholly inapplicable here. One involves an attempt to enforce a remedial order after it was superseded by a settlement agreement with DOE, thus presenting a challenge to an exercise of prosecutorial discretion, which would not be relevant here if OHA's decision is adjudicatory. Ashland Oil, Inc. v. DOE, 760 F.2d 298 (TECA 1985). Another involves an attempt to force DOE to enter a private damages action. Dyke v. Gulf Oil Corp., 601 F.2d 557, 567 (TECA 1979). Of course there is no such action here. The third relates to intervention rights of some of the Con Ed parties, and not only pointed to their status as non-parties to the FSA, but was a case where the court allowed the States, as FSA parties, to intervene in the enforcement case with the approval of DOE. *See*, Getty Oil Co. v. DOE, 865 F.2d 270 (TECA 1988); Getty Oil Co. v. DOE, 117 F.R.D. 540, 549-50 (D. Del. 1987).

G. The Failure to Meet Abstention Standards Did Not Arise until the Tenth Circuit Declined to Exercise Jurisdiction, While Eliminating Any Adequate Alternative Forum by Refusing Transfer. DOE ignores the abstention issue, and thus presumably concedes that if de facto abstention is present, this Court's abstention standards are not met. Chevron's only response is that the issue was not raised below. But this is not an issue which could

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[6] If the primary unreviewability holding were found to belong in the Tenth Circuit, then, of course, there would be no reason for these non-assigned issues to be decided by the Federal Circuit.

have been asserted below. It first arose when the Tenth Circuit's "clarified" second opinion, agreeing that Steel limited the case to the DOE Act-based reviewability ruling, nevertheless refused to address that ruling, and yet declined to transfer the case to the Federal Circuit. Only then was it clear that the court was voluntarily abstaining from exercising jurisdiction. And only then was it apparent that there could not be any alternative forum -- much less an adequate alternative forum -- to defer to.

II. Claims of "Forum-Shopping" And "Discretion" Are Not Adequate Responses to the Tenth Circuit's Serious Misuse of the Transfer Statute to Terminate a Case Because, Before Issue Was Joined, a Protective Appeal Was Withdrawn in Order to Avoid Proceeding in Two Courts at Once.

Had the States appealed only in the Tenth Circuit, transfer would have been routine once jurisdiction was denied. Petitioners in good faith chose a court which, after issue was joined on the merits, ultimately decided that jurisdiction lay elsewhere, thus meeting the standards for application of 28 U.S.C. §1631. Yet, Respondents claim that the States' filing of protective appeals somehow justified the denial of transfer. Respondents' arguments ignore the case law both before and after the passage of §1631 endorsing the filing of protective notices when there is doubt as to jurisdiction between the regional circuits and the Federal Circuit under 28 U.S.C. §1295(a). *See*, Pet. at 7, n.11. Moreover, withdrawal of a protective notice, to avoid simultaneous proceedings on the same matter in two courts, precisely implements Congress' goal in enacting the Transfer Statute. By no means did Congress intend or expect that such a withdrawal -- intended to avoid duplicate litigation -- would be the basis for denying transfer under a statute with the same purpose.

Respondents ignore this basic defect in the Tenth Circuit's unprecedented application of the "interest of justice" standard. DOE merely recites the court's position without defending it. Chevron insinuates that the States' case deserved a death penalty to punish the selection of the Tenth Circuit for the principal appeals

and the withdrawal of the protective appeals. Chevron arrives at the view that these actions were part of an improper forum-shopping scheme by ignoring the single most relevant date in its otherwise exhaustive chronology: on June 30, 1999, after full briefing on the jurisdictional issues, the Tenth Circuit, for all intents and purposes, took jurisdiction of the primary appeals by declining summary dismissal, referring the jurisdictional issue to the merits panel, and ordering briefing and oral argument on the merits. At that point, the States could reasonably expect that the Federal Circuit would avoid duplicative proceedings by granting the pending request for a stay of the protective appeals. Instead, that court denied the stay and also ordered briefing on the merits simultaneously with the Tenth Circuit briefing. Thus, the States had the choice of proceeding to the merits in both courts, or withdrawing the protective notices and proceeding in the court the States believed had primary jurisdiction over the issues they sought to raise. Of course, in precisely this circumstance, the Transfer Statute was intended to encourage and protect the choice of a single court even if that choice turns out to be wrong. The States' actions were not underhanded; they were not "forum shopping;" rather, they *decreased* the "burdens imposed on" the parties and the courts. Chev. Opp. at 20. In short they were very much in the interest of justice, as contemplated by Congress.[7]

Chevron's implication that the States' choice of the Tenth Circuit had no substantial basis is contradicted by the Tenth Circuit's denial of summary dismissal. More importantly, the States had (and still have) every reason to believe that Steel would eliminate the merits issues and leave only the DOE Act prosecutorial discretion issue, a regional circuit issue. In fact, the Tenth Circuit ultimately applied Steel to eliminate the merits issues.

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[7] Chevron's discussion of Congress' view of forum shopping misses the point. The legislative history of § 1631 in fact shows that Congress' remedy for inappropriate forum shopping was to facilitate quick transfer of the case to another court. *See*, 127 Cong. Rec. 20849, 29868 (Dec. 8, 1981) (remarks of Senator Specter).

Respondents cite no case requiring the States to anticipate -- at their peril -- that, even after accepting the States' Steel argument and disclaiming its earlier reliance on the District Court's merits discussions to refuse jurisdiction, the Tenth Circuit would nevertheless rule that the potential presence of unappealed ESA issues in the case precluded it from acting at all, even as to issues within its jurisdiction.

The Respondents contend it was within the court's discretion to rely upon the Federal Circuit's grant of voluntary dismissal "with prejudice," and that the States did not preserve their objections on this issue. But they do not refute Petitioners' showings (Pet. at 25-26 & nn.26-27) (a) that the Federal Circuit did not dismiss the States' protective appeals involuntarily, but in fact denied Chevron's motion to do so, and instead granted the States' request for voluntary dismissal,[8] (b) that voluntary dismissals may not be conditioned upon a preclusion of a later transfer, (c) that the Federal Circuit had no authority to rule on the issue of transfer, which was not before it, had not been briefed, and in any event is a decision assigned to the transferor court, (d) that dismissals without adjudication of the merits do not bar later actions on the same claims, regardless of the label "with prejudice," and (e) that, even if preservation of the issue were necessary, the States' letter accepting voluntary dismissal "with prejudice" preserved the transfer issue by acceding only to the ordering language, which did not mention transfer, and by doing so "[w]ithout forgoing any other rights or objections they may have in these or any other proceedings."[9]

In sum, the denial of transfer here, resulting in the denial of any forum for the appeal of a case by public officials for public benefit, commands this Court's intervention to prevent a total frustration of Congressional intent and a total perversion of the interest of justice standard.

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[8] DOE Opp., Appendix A at 4a.

[9] DOE Opp., Appendix B at 6a.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition should be granted with respect to both cases below.[10]

Respectfully submitted,

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September 11, 2000

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[10] Chevron implies that there is some ambiguity about the States' intention that the Petition cover Tenth Circuit Docket No. 99-3066. As the Petition makes clear, a reversal of the jurisdictional ruling in 99-3065 would require reversal of 99-3066, in which the court adopts "the same reasons" as it applied in 99-3065. Pet. App. at A-15. Moreover, if this Court rules the Tenth Circuit has jurisdiction over the DOE Act issue, and that court on remand reverses the district court's "prosecutorial discretion" holding, then the Tenth Circuit would have to reconsider all rulings in both cases dependent on the DOE Act ruling. For example, if the dismissed FSA claim is ruled viable, then the court must consider anew the States' assertion that no separate standing analysis is needed for the 99-3066 non-FSA claims, which are part of the same case or controversy as the FSA claims.